Supreme Court, U.S.
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No. 93-1582

In The

# Supreme Court of the United States

October Term, 1993

CARROLL LEBLANC, wife of/and
GERALD CONSTANCE AND CLEARY BICYCLE,
MOPED & GO-CART CENTER, INC.,

*Petitioners,*

v.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT,

*Respondent.*

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD J. BERTRAND
BERTRAND & SOILEAU
Post Office Box 5
Rayne, LA 70578-0005
(318) 334-2139
*Counsel for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

I.

Did the roadway redesign and construction activities of the Louisiana Department of Transportation and Development constitute a "Taking" of private property for public use without compensaton as forbidden under U.S. Constitution, Amendment V?

II.

Have applicants been denied "equal protection" under the law by the decision of the Louisiana Supreme Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 5

CONCLUSION ..... 13

# TABLE OF AUTHORITIES

Page

CASES

*Butler v. Baber*, 529 So. 2d 374 (La. 1988) ..... 10, 11, 12

*Constance v. State of LA, DOTD*, 626 So. 2d 1151 (La. 1993) ..... 5, 9, 11, 12

*Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) ..... 6, 7, 9

*Ramelli v. City of New Orleans*, 96 So. 2d 572 (La. 1957) ..... 8

*Reymond v. State, Dept. of Hwys.*, 231 So. 2d 375 (La. 1970) ..... 5

STATUTES

U.S. Const. Amend. V ..... 3, 4, 6, 8

La. Const. Art. 1 §4 ..... 5

## STATEMENT OF THE CASE

This matter involves an inverse condemnation claim by petitioners for alleged business losses and reduction in value to their property arising out of the State's redesign of traffic routes at the Clearview Parkway/Interstate 10 Interchange in the metropolitan New Orleans area and the construction which accomplished that purpose. The entire project was less than ½ mile in length and was accomplished entirely within the State's existing right of way. The construction began September 1, 1981 and the project was completed on March 23, 1982. A formal acceptance was filed by the State in the Office of the Clerk of Court by letter dated April 8, 1982. Thus the entire construction period lasted only 7 months.

Prior to and during construction, petitioners operated a retail establishment known as Cleary Bicycle, Moped and Go-Cart Center, which was located at the intersection of the I-10 Service Road and Sanford Street. Since the construction was accomplished entirely within the State's existing right of way, there was no need to expropriate any property from the petitioners. There was no physical utilization of any of petitioners' property during construction. Petitioners contend that the 7 months of construction interrupted their business by making the store less accessible and that the methods of getting to the store after construction have changed; yet during and after construction, the store was always open for business and ingress and egress to the business premises was always available.

There are many allegations in the Statement of the Case contained in petitioners' writ application that are

exaggerated or are quotations taken from the opinion of the State Appellate Court which were subsequently rejected by the Louisiana Supreme Court. It should be noted that there are no quotes from the Louisiana Supreme Court opinion which reversed the lower courts in applicants' Statement of the Case. The first such exaggeration is found on page 4 of the petition wherein applicant states that the construction created a "walled off, island existence. Petitioners were stranded from the life line of their blood, i.e., customers." Similarly, on page 7 of the petition we find the statement that "when the State started its project, each and every method of getting to petitioners' building and business was blocked." And on page 9 of the petition, applicants would have this Court believe that following the completion of construction, "only one of those methods of approach remains following the redesign." It is suggested that this Court need only refer to the decision of the Supreme Court of Louisiana in this matter, which is attached as Appendix A to the Petition for Writ of Certiorari, for a correct and impartial statement of facts. The Supreme Court clearly recognized that Cleary Bicycle suffered some inconvenience during construction, but that customers were able to have access to the store and that there is plenty of access from various directions remaining after the construction and redesign in this area. It should be noted that this store was on a frontage road in a heavily travelled interchange even before the redesign and access was always somewhat circuitous. The most relevant facts for the purpose of argument to this Court are: 1) there was no property expropriated from petitioners; 2) there was no physical utilization of petitioners' property during construction; 3)

petitioners were able to continue to operate as a retail store continuously during construction; 4) customers were able to get to them continuously during construction; 5) the store continues to operate as a retail store after the completion of construction; 6) the State exercised no control over petitioners' property or the business conducted thereon before, during or after construction; and, 7) the property continued to be utilized in the same manner during and after construction as it did before, namely as a retail operation known as Cleary Bicycle, Moped and Go-Cart Center.

## SUMMARY OF ARGUMENT

In this inverse condemnation case, petitioners allege that the denial of recovery by the Louisiana Supreme Court constitutes a denial of their rights under Amendment V to the U.S. Constitution. In order to recover under the Fifth Amendment for damages to property when there has been no formal expropriation or physical invasion of the property, this Court has recently held that the governmental action complained of must result in the denial of all economically beneficial or productive use of the property to the landowners. This Court has further held that even if such governmental regulation denies all economically beneficial or productive use, the landowner may still not recover if the action complained of was a legitimate exercise of the police power of the governmental entity which pre-existed the landowner's ownership of the property.

In this case, the governmental activity complained of was the redesign of traffic patterns and traffic flows and the construction activities necessary to accomplish that redesign. The activities were conducted solely within the confines of existing right of way owned by the Louisiana Department of Transportation & Development. There was no formal expropriation from the petitioners and there was no physical invasion of their property. During the period of construction and thereafter, the petitioners enjoyed access to abutting streets from their property and continued to utilize the property in the conduct of their retail business throughout. There has, therefore, been no taking of their property under Amendment V to the U.S. Constitution.

Alternatively, petitioners argue that the Louisiana Supreme Court has applied a different standard to the Louisiana Department of Transportation & Development in this case than it did to private landowners in another case. The other case referred to, however, did not involve any federal questions nor any constitutional issues under the U.S. Constitution or the Louisiana Constitution. The argument was raised before the Louisiana Supreme Court and rejected by that Court. Since no federal question is raised by this additional argument, it does not merit this Court's consideration. Even if it did, the two cases do not reach opposite results because of the application of different law, but because different facts were involved. Petitioners have been afforded full due process of law and have been treated equally by the courts. There is no basis for the granting of this writ application by this Court.

## ARGUMENT

Since no formal expropriation took place in this matter, petitioners' theory of recovery in the Louisiana courts was that the design and construction activities of the Louisiana Department of Transportation & Development amounted to an inverse condemnation which had damaged the value of their property and caused them to suffer business losses. The Louisiana courts have for many years recognized the right to recovery in appropriate circumstances for an inverse condemnation for taking or damaging of property other than by formal expropriation proceedings under Article 1, Section 4 of the Louisiana Constitution of 1974, as well as under its predecessor.[1] In the instant case[2], the Louisiana Supreme Court again recognized the existence of an inverse condemnation right of action under the Louisiana Constitution of 1974. In the copy of the opinion attached as Appendix A to the petition filed herein, it can be seen that the Louisiana Supreme Court went to great lengths to reconfirm the availability of the remedy and the conditions which must exist for damages to be recovered for an inverse condemnation. The Court made it clear that recovery will not be allowed in every situation in which damages occur, but only in those situations in which the State has caused physical damage to property or where the State's activity is deemed to have been excessive or abusive. Having found neither physical damage to petitioners' property nor excessive or abusive conduct on behalf of DOTD, the Louisiana Supreme Court found that

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[1] *Reymond v. State, Dept. of Hwys.*, 231 So. 2d 375 (La. 1970).

[2] *Constance v. State of La., DOTD*, 626 So. 2d 1151 (La. 1993).

petitioners were not entitled to recover any damages they may have sustained.

In an application for rehearing to the Louisiana Supreme Court and in its writ application to this Court, petitioners now contend that the guidelines set forth by the Louisiana Supreme Court for recovery in inverse condemnation situations is contrary to rights set out under Amendment V to the United States Constitution. Alternatively, petitioners contend that the holding of the Louisiana Supreme Court has denied them equal protection under the law.

## ARE PETITIONERS ENTITLED TO RECOVERY UNDER AMENDMENT V TO THE U.S. CONSTITUTION?

This Honorable Court recently re-examined what governmental activities would constitute a "taking" other than the actual formal expropriation of property.[3] While the *Lucas* case dealt with regulatory takings, the rationale should be the same for other governmental activities, such as construction, which indirectly impact landowners. In *Lucas* this Court again repeated that it has avoided any set formula for determining when a governmental regulation or activity has gone too far, but recognized the two basic categories that have triggered the awarding of compensation in these situations.

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[3] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

> "We have, however, described at least two discrete categories of regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas,* supra at p. 2893.

> "The second situation in which we have found the categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land . . . As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land'." *Lucas,* supra at p. 2893.

In the instant case, there was no "physical invasion" of petitioners' property. Thus, there has been no taking under the first category referred to above. Neither has there been a taking under the second situation described above. The State of Louisiana had a legitimate state interest in the redesign of the intersection to promote public safety. Furthermore, neither this redesign of the intersection for public safety purposes nor the construction to accomplish those purposes denied the petitioners economically viable use of their land. As stated previously and as acknowledged by the Louisiana Supreme Court, these landowners continued to utilize their land during

and after construction for the same purpose and in the same manner as they did prior to the redesign and construction. While petitioners may decry the test applied by the Louisiana Supreme Court of "abusive or excessive conduct" in the absence of physical damage by the State, that standard is surely no more harsh than the requirement imposed by this Court that the governmental actions must result in a total loss of use of the property. Regardless of whether or not the standard applied by the Louisiana Supreme Court may in some other particular instance abridge the right to compensation of a landowner under the Fifth Amendment to the United States Constitution, it is obvious under the facts of *this* situation that the holding of the Louisiana Supreme Court is not in conflict with the holding of this Court in *Lucas* and other similar cases.

Furthermore, the actions of the State in redesigning traffic flow and traffic patterns while still maintaining access from the property to an abutting roadway was a legitimate exercise of the police power of the State which existed long before petitioners herein acquired title to their property. This was clearly recognized and set out by the Louisiana Supreme Court in its decision herein:

> "Furthermore, it has long been recognized that a public body has the right, under its police power, to divert traffic without subjecting itself to liability. *Ramelli v. City of New Orleans*, 233 La. 291, 96 So. 2d 572, 574 (1957). While recognizing that commercial property owners were inconvenienced by the narrowing of a major traffic artery to construct an overpass and by the diversion of traffic some 3000 feet, the Ramelli court noted that the inconvenience was common to all

> property owners within the same vicinity. Accordingly, the court affirmed the ruling of the trial court that the plaintiff's had sustained a loss without an injury in the legal sense. Similarly, other jurisdictions have concluded that a property owner has no protectible interest in such traffic flow, as opposed to access." *Constance v. State*, supra at p. 1156. Emphasis added.

This Court recognized in *Lucas*, as it had on prior occasions, that the State's use of these pre-existing police powers does not give rise to compensation.

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our takings jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the bundle of rights that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Lucas*, supra at p. 2899.

The petitioners in this case cannot even approach the threshold for compensation set by this Court in *Lucas*. While they may have sustained some inconvenience for 7 months, that inconvenience was caused by a legitimate application of the police power enjoyed by the State over

its own right of way; furthermore, they continued to enjoy the full use of their property during and after construction despite this inconvenience.

## HAVE APPLICANTS BEEN DENIED EQUAL PROTECTION UNDER THE LAW BY THE DECISION OF THE LOUISIANA SUPREME COURT?

In this alternative argument, petitioners complain that the Louisiana Supreme Court in this case did not apply the same standard to the State as it did to private individuals in its decision in *Butler v. Baber,* 529 So. 2d 374 (La. 1988). Petitioners argue that these differing standards applied by the Louisiana Supreme Court have deprived it of equal protection under the law.

Petitioners' greatest failure in this argument is the failure to point out what federal laws or statutes have been unequally applied so that this Court would have an interest. It has already been demonstrated in the foregoing section that petitioners' rights under the Fifth Amendment to the U.S. Constitution have certainly not been violated. Petitioners have certainly had access to the Courts to pursue their claims and they have been afforded due process under the law.

The statutes involved in the *Butler v. Baber* case decided by the Louisiana Supreme Court were Louisiana statutes. There were no issues involving either the Louisiana Constitution or the U.S. Constitution in the *Butler v. Baber* case. Thus, petitioners' argument amounts to a complaint that the Louisiana Supreme Court failed to follow its own ruling in *Butler v. Baber* in deciding this case. That

argument was rejected by the Louisiana Supreme Court after full consideration. This Court need not even consider the argument because it raises no federal question.

Even if the argument raised a question deserving of this Court's consideration, the argument itself is without merit. In *Butler v. Baber,* monetary damages were awarded to a lessee of oyster beds because dredging activities conducted nearby had *physically* disturbed the beds. The dredging had caused mud to cover the oyster beds, thereby blackening and suffocating the oysters. Thus, there was a physical invasion and damage to the property covered by the oyster lease.

In this case, the Louisiana Supreme Court made it obvious that damages can be awarded for inverse condemnation if there is personal injury or physical damage to property and the requirement of some type of excessive or abusive conduct is only necessary where there is no such evidence of personal injury or physical damage to property:

> "The liability of a public body in such case, however, has been limited to those instances where there is a *physical taking or damage to property* or a special damage peculiar to the particular property and not general damage sustained by other properties similarly located." *Constance v. State,* supra at p. 1156. Emphasis added.
>
> "But, *in the absence of* a taking *or physical damage,* general damage sustained by property as a consequence of public improvement, such as some degree of inconvenience, must be suffered and

> endured by owners of separate tracts for the benefit of the general public." *Constance v. State,* supra at p. 1156. Emphasis added.
>
> "The Chambers court concluded that, *where there is no allegation or evidence of personal injury or physical damage to property,* a finding of liability under Article 667 requires proof of the presence of some type of excessive or abusive conduct." *Constance v. State,* supra at. p. 1157. Emphasis added.
>
> "There is proof *neither of physical damage to property* nor excessive or abusive conduct by the DOTD." *Constance v. State,* supra at p. 1157. Emphasis added.

It is obvious from the above that had there been physical damage in this case as there was in *Butler v. Baber,* there would have been recovery for such physical damage. The results of these two cases, therefore, do not contradict one another and petitioners have not been denied equal protection under the law by the holding of the Louisiana Supreme Court herein.

## CONCLUSION

There is no merit to either argument raised by petitioners herein. Respondent urges this Court to reject their petition for a writ.

Respectfully submitted,

RONALD J. BERTRAND
Bar Roll #3060
Post Office Box 5
Rayne, LA 70578-0005
Phone: (318) 334-2139
*Counsel for Respondent*